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No. 94-1090

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY, WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, AND
KALISPEL TRIBE OF INDIANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

KALISPEL INDIAN TRIBE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the federal courts have jurisdiction to adjudicate a claim that: a) certain lands are part of an Indian reservation and held in trust for a tribe or its members; b) use or ownership of those lands has not been acquired in accordance with federal law; and c) damages and injunctive relief should be awarded for the unlawful occupancy?

2. Should the Court abandon the rule that the use or ownership of Indian trust lands may only be acquired in a manner authorized by Congress and overrule *United States v. Clarke*, 445 U.S. 253 (1980), to permit the petitioner an inverse condemnation in this case?

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STATEMENT OF THE CASE

Nearly fifteen years ago, the United States, as trustee and fee owner of certain tribal and allotted lands within the Kalispel Indian Reservation, sued the petitioner (hereafter "PUD") in federal district court, claiming a trespass and seeking relief. The United States alleged that the reservoir of the PUD's Box Canyon power project was encroaching on these Indian trust lands.[1] The Kalispel Tribe intervened. The background and procedural history of this litigation is summarized by the Court of Appeals in its 1991 opinion in this case. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1504-1505 (9th Cir.), *cert. denied, sub. nom., Washington Dept. of Nat. Resources v. United States*, ___ U.S.___, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991).

In its petition for review of the Court of Appeals' 1994 decision, the PUD mischaracterizes the facts and the law. Contrary to the PUD's repeated assertions that no tribal trust lands were involved, the record contains evidence that, at the time of the license application, the land which was to be flooded by the Box Canyon project included unallotted, tribal trust land. U.S. Complaint, E.D. Wa. No. C-80-116, Exhibit A, R. 1; Affidavits of Lila LaDue, Pl. Ex. 1003, R. 613. By 1987, approximately half of the reservation acreage inundated by the reservoir had been restored to tribal trust status. *Id.* In answering the trespass complaints, however, the PUD denied that

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[1] "Trust lands," as used in this brief, refers to lands in which the United States holds the fee title in trust either for the Kalispel Tribe or for individual Indians who own an interest in an allotment.

Indian trust lands were occupied by the Box Canyon reservoir. It did not plead that its Federal Power Act ("FPA") license authorized the occupancy of the Kalispel Indian Reservation. *See* Answer, 6/4/81, R. 4; Amended Answer, 5/5/82, R. 24, and 2/1/83, R. 69. The PUD's defense relied on the assertion that the ordinary high water line ("OHWL") lay at a 2041-foot elevation, the reservoir was therefore within state-owned riverbed over which the PUD had an easement, and no Indian trust lands were occupied by the project. *See, e.g.*, Answer, 2/1/83, R. 69; 926 F.2d at 1505.

Both the District Court, and the Court of Appeals in 1991, rejected the PUD's OHWL contention as contrary to long-standing legal prescriptions for locating the line. In the 1991 appeal, the Court of Appeals affirmed the District Court's conclusion that a trespass existed. 926 F.2d at 1505, 1507. The Court of Appeals examined both federal and state common law defining OHWL, found the relevant factors to be the same, and, relying on *Howard v. Ingersoll*, 54 U.S. (13 How.) 409 (1851) and *Austin v. City of Bellingham*, 69 Wash. 677, 126 P. 59 (1912), among other authority, affirmed the determination that the pertinent OHWL is at 2028 feet. 926 F.2d at 1505. The PUD attempted to relitigate the OHWL determination in a related, state court case. It asked the Washington State Supreme Court to overrule *Austin. PUD No. 1 v. Tombari Family Partnership*, 117 Wn. 2d 803, 819 P.2d 369 (1991). The Court declined and held that the PUD claim was barred by collateral estoppel. 117 Wn. 2d at 804-805, 819 P.2d at 370. This Court denied the PUD's certiorari petition as to the 1991 Court of Appeals decision. ___ U.S. ___, 112 S.Ct. 415.

The 1994 Court of Appeals decision arises from a separate appeal in "phase 3" of the litigation, which addressed the remedies for the trespass, specifically the measure of damages and the appropriateness of injunctive relief.[2] *See U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d at 1505. The PUD contended that no trespass determination had yet been made and sought to relitigate the trespass claim, this time arguing that Article 33 of its FPA license authorized the occupancy of Indian trust lands on the Kalispel Reservation.[3]

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[2] The rulings the PUD appealed essentially relate to its position that it may acquire permanent rights to occupy the Kalispel lands for power purposes without seeking an amendment to its FPA license. These rulings include the denial of the PUD's post-judgment motion for a declaration that the PUD has the right under its license to continue to occupy the trust lands and for an adjudication of the future payments, based on grazing value, which would be required. They also include the dismissal of a formal condemnation action. In addition to the United States' and Tribe's appeal of the damage measure and denial of injunctive relief, the Tribe appealed the denial of a motion to amend its complaint.

[3] Although the District Court heard evidence regarding the license during the 1987 trial and noted certain of its provisions in its Findings, the PUD did not request a ruling that the license authorized occupancy of the Kalispel trust lands until after the Court had rejected its contention that no Indian trust lands were being occupied and entered its Findings, Conclusions, and Judgment, adjudicating a trespass. *See* PUD's Motion to Amend Its Pleadings To Conform To Evidence To Seek A Declaratory Judgment Re: Operation of the Box Canyon Project And Future Damages Based On Grazing, filed October 5, 1987, R. 579; PUD's Motion For Declaratory Judgment Re: Operation of the Box Canyon Project And Future Damages Based On Grazing Value, filed October 5, 1987, R. 580.

The Court of Appeals held that the existence of the trespass had been established in earlier proceedings and that it was too late to relitigate that matter. The District Court had expressly ruled, in 1983, that the Kalispels were entitled to damages based on a "trespass." *USA and Kalispel Indian Tribe v. Pend Oreille Co. PUD and Dept. of Nat. Res., WA*, No. C-80-116, Findings of Fact and Conclusions of Law and Judgment, CL 5, R. 256. In 1987, noting the PUD license, the license amendment, and specifically Article 33, the District Court reiterated that, "The PUD has trespassed on a total of 186.07 acres of the Kalispel Indian Tribe and individual allottees." Findings of Fact and Conclusions of Law and Judgment filed August 10, 1987, CL 1, Petition for a Writ of Certiorari ("Pet."), Appendix ("App.") 42a. In 1991, the Court of Appeals, like the District Court, had described the OHWL issue as controlling the trespass adjudication:

> Following the district court's approach, we first consider whether the dam caused the waters of the river to trespass upon the Tribe's riparian lands where the river borders the reservation. The parties agree that the ordinary high water line of the river marks the boundary between riparian lands and riverbed. If the dam raised the river above this line a trespass upon the Tribe's riparian lands occurred. The dispute is over the location of this line.

926 F.2d at 1505 (footnote omitted).

While the Court of Appeals in 1994 ruled that relitigation of the trespass issue was precluded, it found the PUD's license argument to be "without merit," in any event. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d

1544, 1547 (9th Cir. 1994), App. 8a. License Article 33 requires the PUD to operate the Box Canyon project in "such a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation" and provides a procedure by which the Secretary of the Interior can determine compensation if harm occurs. Citing this Court's decisions in *United States v. Clarke*, 445 U.S. 253 (1980), *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) and *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Court of Appeals ruled that to construe Article 33 as authorization for the PUD to extend its reservoir onto the lands, subject to a claim for compensation, would mean that an unlawful inverse condemnation of Indian trust lands had been permitted and that the Commission had allowed occupation of the Kalispel Reservation without the special findings, conditions, and charges required by the FPA.[4] 28 F.3d at 1548-1549, App. 9a-10a. The Court ruled that the plain language of the license did not support that construction. The PUD then contended that the federal courts had no jurisdiction to determine whether the license authorized the occupation of the Indian trust lands. PUD's Petition For Rehearing, pp. 12-13.

Contrary to the PUD's assertion, the United States and Tribe had not challenged the propriety of the license or any of its terms, and the Court of Appeals did not hold

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[4] The Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, has been codified as Part I of the FPA, 16 U.S.C. § 791a *et seq.* For dates prior to October 1, 1977, "Commission" refers to the Federal Power Commission and thereafter to its successor, the Federal Energy Regulatory Commission. *See* 42 U.S.C. §§ 7172(a), 7295(b).

that the 1952, 1956 and 1963 FPC orders violated the FPA, or overrule or reverse the Commission. *Cf.*, Pet. pp. 10, 15. The United States and the Tribe sued to establish a trespass and obtain appropriate relief. Later in the litigation, the PUD argued as a defense that Article 33 of the license, which expressly prohibits any interference or damage to Kalispel lands, could be construed to permit the flooding. The district court had not so found when it declared a trespass in 1987. App. 42a. The United States and Tribe maintained that the plain language of the license documents and the applicable law clearly refuted the PUD's assertion that Article 33 could constitute authorization for the occupancy of the Kalispels' trust lands.

Although the PUD claims to have believed, when it applied for its license, that no Indian trust lands would be occupied by the reservoir because the OHWL was at 2041 feet, it proceeded to seek flowage easements from the BIA to flood Indian trust lands. In 1954, the PUD acquired six easements but these were limited to flows below 2031.3 feet and to 2028 feet during haying season and only affected some of the trust parcels. Findings of Fact (August 10, 1987), # 5, App. 36a. *Cf.* Pet. p. 6.[5] Feeling "frustrated," (Pet. p. 22), the PUD took the law into its own hands.[6] As specifically concluded by the District Court, the PUD simply violated the easements'

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[5] There were only six easements covering only 33.86 acres of the 186.07 acres of Indian trust lands flooded by the project. *See* Affidavit of Lila LaDue, Pl. Ex. 1004, R. 613.

[6] The PUD attributed part of this "frustration" to its own inaction in pursuing easement negotiations when "personnel at the PUD also changed." *See* PUD's Proposed Pretrial Order (May 27, 1987), Factual Contentions, # 11, p. 11, R. 553.

limitations and knowingly occupied trust lands for which no easement had been granted. FF # 9, 10, App. 37a, 39a-40a. At closing argument following the 1987 trial, the Court explained its view of the PUD's easement defense:

> And with everybody else you got your easements. I don't know what they were, but you got them and then you proceeded onward. You proceeded onward at a time when you didn't have the easements from the Indians, and you chose to do so somewhat at your own peril, because the Indians are a whole different thing, and everybody knows that. You probably, or should have known it even before this morning.
>
> So that being the case, it's clear you trespassed to some extent on that six feet, and they are entitled to be compensated for that. And that trespass has now gone on for 31 years, probably a little more aggravated since 1963, but nevertheless has gone on for that period of time.

Transcript, June 4, 1987.[7]

Having found a trespass, the District Court set damages based on the land's grazing value, thus rejecting the United States' and Tribe's contention that power site value should be considered. In deciding that the value of the land as part of a power project is a more appropriate

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[7] The PUD incorrectly suggests that the appellate court had none of the transcript and an inadequate record from which to reach its decision. *See* Pet. pp. 11, 23. The Court of Appeals did have portions of the transcript before it, including this section. The PUD had the opportunity to, and did submit, those portions of the transcript it considered pertinent. *See* PUD's and State's Supplemental Excerpt of Record, Phase III, Vol. V, Ninth Cir. Nos. 88-3617, 88-3618, 88-3619, 88-3669, 92-35504, pp. 915-916.

measure, the Court of Appeals noted that the damage formula urged by the PUD would encourage others to use Indian reservation lands for power production without complying with the FPA. 28 F.3d at 1551, Pet. App. 17a-18a. The Court did not rule that an injunction must issue but found that the District Court's denial rested on the erroneous legal premise that the lands could be inversely condemned. It remanded the question of injunctive relief for reconsideration. *Id.* at 1551-1552, App. 19a-21a.

REASONS FOR DENYING THE WRIT

This litigation has no importance beyond the situation created by the PUD's trespass. No novel questions of law are presented and no conflict of decisions exists. All the PUD's arguments run counter to precedent. The alleged discrepancies between the Court of Appeals' rulings and the record are not well-founded. The assertions of numerous factual disputes only leave the case in a confusing posture. The Court of Appeals properly decided phase 3 of this litigation.

Federal Courts Have Jurisdiction To Adjudicate A Claim Of Trespass On Indian Trust Lands And To Award Damage And Injunctive Relief

Federal courts have jurisdiction to decide whether the possessory rights of Indians to their lands under federal law have been violated and to grant appropriate relief. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-236, n.6 (1985); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). The

PUD acknowledges federal court jurisdiction to determine "the property issues" but argues an exception for "trespass." Pet. p. 29. There is no support in law or logic for that distinction. The Court of Appeals noted that the PUD had not disputed that federal law controls an action for trespass on Indian lands, and the Court cited case law dating from 1850 recognizing "a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages." 28 F.3d at 1549 n.8, App. 13a-14a. No statute of limitations barred the filing of this case in 1980. *See Oneida Indian Nation*, 470 U.S. at 240-244.[8]

FERC Does Not Have Primary Jurisdiction In This Matter

The action filed by the United States required a forum which could adjudicate title, determine proprietary rights, and award damages and injunctive relief, all of which are beyond the Commission's jurisdiction. Contrary to the PUD's characterization of this litigation, neither the United States nor the Tribe challenged the

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[8] Nor can the PUD rely on the long, ongoing period of unauthorized flooding (Pet. p. 22, etc.), or frustrated expectations that easements would be granted, to establish a right to occupy these lands. The rights of Indians in their trust or restricted property cannot be divested by laches, estoppel, or similar doctrines. *See Cramer v. United States*, 261 U.S. 219, 234 (1923); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); *Minnesota v. United States*, 305 U.S. 382, 388-389 (1939); *Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 699 (9th Cir. 1976); *F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 525. *See also Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-409 (1917).

propriety of the 1952 license, 1956 order, or 1963 amendment. They did not seek to appeal or collaterally attack any order issued under the FPA regarding the Box Canyon project. The PUD's license and the Commission orders came under consideration at the instance of the PUD.

The Court of Appeals properly held that the PUD's attempt to relitigate the trespass in the remedies phase was barred. *See* 18 C. Wright, A. Miller, & Cooper, *Federal Practice and Procedure,* (West Pub. 1981), § 4418, p. 174 ("Direct estoppel also may arise from action that is designed to conclude part of a single claim on the merits, but to leave the way open for further action on the balance of the claim"); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (dismissal of claim of violation of price regulation was *res judicata* in damage phase of case and in related damage action); *Butler v. Pollard*, 800 F.2d 223 (10th Cir. 1986) (general jury verdict was in effect a determination of the trespass claim, which determination was binding in the injunction phase of the case). In *Metromedia Co. v. Fugazy*, the Court barred relitigation of a fraud issue in a subsequent damage action, explaining that,

> . . . The mere fact that the damages awarded to the plaintiff have not yet been calculated, though normally precluding an immediate appeal . . . does not prevent use of a final ruling on liability as collateral estoppel.

983 F.2d 350, 366-367 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2445, 124 L.Ed.2d 662. As summarized in Wright, Miller, & Cooper, Vol. 18, § 4434, p. 321:

> . . . Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion . . . to determinations of liability that have not yet been completed by an award of damages or other relief.

Here, the parties had the opportunity to appeal the phase 1 trespass adjudication, which the PUD did. The 1991 affirmance, followed by the denial of certiorari, rendered the trespass determination final and binding.

The Court of Appeals did not exceed its jurisdiction in rejecting the PUD's license defense as plainly without merit as a matter of law. It is not an infringement of Commission jurisdiction for a court to determine that an FPA licensee is violating property rights, and award damages and injunctive relief. *See Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *Federal Power Com'n v. Niagara Mohawk Corp.*, 347 U.S. 239, 254-256 (1954). In *Henry Ford & Son*, this Court held that 16 U.S.C. § 803(c) specifically preserves such damage claims. 280 U.S. at 378-379. As recently stated in *Nez Perce Tribe v. Idaho Power*, "It is clear that FERC does not have jurisdiction to adjudicate property disputes or to award monetary damages." 847 F.Supp. 791, 800 (D. Idaho 1994), *appeal docketed*, Ninth Circuit No. 94-36237. The Court ruled that no collateral attack occurs when a tribe sues for damage to property. *Id.* at 802.

It is settled that the Commission lacks jurisdiction to adjudicate property rights, whether the asserted rights are in real property or are water rights. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, this Court ruled that the Commission does not have jurisdiction

> . . . over such questions as the sufficiency of the legal title of the applicant to its riparian rights . . . Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by an applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken.

328 U.S. 152, 178 (1946). More recently, in *California v. FERC*, the Court distinguished the Commission's authority over regulatory issues from the authority of other entities over proprietary rights. 495 U.S. 490, 497-498, 503 (1990). While the Commission may be able to inquire into the legal capacity of a licensee, it does not therefore have authority to adjudicate that capacity. *See State of Washington Dept. of Game v. FPC*, 207 F.2d 391, 396-397 (9th Cir. 1953), discussed in *Tacoma v. Taxpayers*, 357 U.S. 320, 340 (1958). *See also Atchison T & S F Ry Co. v. Wichita Board of Trade*, 412 U.S. 800, 821 n.14 (1973), quoting with approval, *Locomotive Engineers v. M.K.T.R. Co.*, 363 U.S. 528, 534 (1960) (no primary agency jurisdiction when the agency and court would conduct different examinations of a dispute, each with a different purpose); *Pennsylvania W.&P. Co. v. Consolidated G., E. L. & P. Co.*, 184 F.2d 552, 562 (4th Cir. 1950); *South Carolina Public Service Authority v. FERC*, 850 F.2d 788, 791-792 (D.C. Cir. 1988). The Commission itself disclaims any authority to resolve the type of dispute presented in this case. *See, e.g., Escondido Mutual Water Co. Project No. 36*, 6 FERC ¶ 61,189 (1979), p. 61,449, *aff'd in part, rev'd in part on other grounds, Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (" . . . the Commission has no authority to adjudicate claims for money damages."); *Idaho Power*

Company, Project No. 1971, 29 FPC 572 (Issued March 22, 1963) (Commission is not the forum in which to litigate issues such as negligence and determine damages).

Ironically, the PUD earlier attempted to delay the Commission staff in taking action based on the PUD's exceeding its licensed project boundary, pending the completion of this litigation. In advising the PUD that it is exceeding the licensed project boundary, the Director of the Commission's Office of Hydropower Licensing was careful to distinguish an adjudication of proprietary rights from his review of the geographic scope of the project, as described in the license. In 1991, Director Springer wrote the PUD:

> I do not agree with the suggestion in your letter of August 29, 1991, that the matter of the project's boundary be held in abeyance pending resolution of the court litigation concerning the property ownership issues. The Commission has the primary responsibility for construing and, if necessary, clarifying or revising the license concerning definition of the project's boundary. *This determination is quite independent from the court's determination of who owns the land that the project is inundating.*

See Letter from Springer to Weis, Attachment G, Declaration of Jeffrey S. Schuster, R. 640 (emphasis added). Commission staff, at least, did not have any trouble in distinguishing the federal courts' jurisdiction over the property issues in this case from the role and purposes of the Commission.

The PUD's construction of its license was in clear conflict with the judicially-established meaning of statutory terms and prior Supreme Court rulings on the FPA's prerequisites for authorizing the occupation of Indian trust lands. These were matters within the ordinary competence of the courts. No technical expertise was needed to dispose of the PUD's contentions. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306 (1976); *International Brotherhood v. Hardeman*, 401 U.S. 233, 238-239 (1971).

To portray its FPA license as creating a right to occupy the Kalispel lands, the PUD tried to convert a Commission statement describing the project as "affecting . . . allotted lands within the Calispel Indian Reservation," [Order Issuing License, 53a] to a "clear statement [or "conclusion"] by the Commission that the project would occupy allotted lands within the Indian Reservation." Pet. p. 12 n.5, (C), (D). However, there is a significant legal distinction between projects that "affect" Indian trust lands and projects that "occupy" Indian trust lands. Power projects which only "affect" Indian lands do not invoke the same FPA protections as apply when a project is to "occupy" those lands. *Escondido*, 466 U.S. at 784 (" . . . it is clear that Congress concluded that reservations were not entitled to the added protection provided by the proviso in § 4(e) unless some of the licensed works were actually within the reservation."). The PUD also abused the legal definition of "public lands" when it maintained that § 4(e) of the FPA is satisfied by the Commission finding that

> (6) The issuance of license for the project as hereinafter provided will not interfere or be

> inconsistent with the purposes of any withdrawal of public lands . . .

Pet. pp. 5-6, 25. To convert a finding of consistency and no interference with "public lands" to a § 4(e) finding regarding the Kalispel Indian Reservation requires a disregard for the express FPA definition of "reservation." 49 Stat. 838, 16 U.S.C. § 796(1) and (2). This Court has specifically held that Indian trust lands are not "public lands" under the FPA. *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 443-448 (1955). What the PUD refers to as an "express finding" (Pet. p. 5) of consistency mentions public lands and the Kaniksu National Forest but noticeably omits any mention of the Kalispel Reservation. There is no such finding as to Indian trust lands in any of the license documents.

The 1957 license for the Department of Water Resources of the State of California, Project No. 2100 (the only license for another project cited by the PUD to show it was not unusual to authorize occupancy of a reservation in this manner), actually underscores that the PUD license lacks the provisions a court would expect to be included in a license authorizing the occupancy of Indian trust lands. The Order Issuing License for Project No. 2100 explicitly states:

> The project will affect navigable waters of the States, and *will occupy* . . . certain lands held in trust by the United States for Indians.
>
> * * *
>
> The Acting Secretary of the Interior has reported favorably on the application subject to the inclusion in the license of certain conditions . . . for the adequate compensation to

> Indians whose lands would be inundated by the project . . .

17 FPC 262, 262-263 (emphasis added).

> *The Commission finds:*
>
> (1) The project will *occupy* lands of the United States . . .
>
> * * *
>
> (8) The issuance of a license for the project as hereinafter provided *will not interfere or be inconsistent with the purposes of any reservation* or withdrawal of public lands . . .

Id. at 263, 265 (emphasis added). In relying on this license, the PUD omits the significant word "occupy" from its description. Saying instead that "the Commission determined that the project would *affect* 'certain lands held in trust by the United States for Indians;' " it glosses over the express reference to "reservation". *See* Pet. p. 25 (emphasis added).

The contention that Article 33 can be read as authorization to occupy Indian trust lands subject to a claim for compensation not only requires tampering with the plain meaning of that license article but also depends on a misapprehension of the law. Neither the Secretary of Interior nor the Commission could have authorized what would amount to an inverse condemnation of Indian trust lands. *See United States v. Clarke, supra; F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 517 ("Executive action to authorize alienation of tribal lands is ineffective absent express congressional authority."). By characterizing an express prohibition of interference or damage as an authorization of occupancy, it is the PUD,

not the Court of Appeals, which "has eviscerated license Article 33." *Cf.*, Pet. p. 21.[9]

The PUD's construction of its license was thus foreclosed by prior judicial interpretations.[10] No agency adoption of the PUD's construction could have been sustainable, since it conflicted with clear statutory requirements for locating a "project work" on an Indian reservation. *See Escondido*, 466 U.S. at 779-783 and n.22. The PUD claim did not turn on technical issues but on broader, legal issues which "belong to the sphere of judicial rather than agency expertise." *See State of Cal., ex rel. Water Res. Bd. v. FERC*, 877 F.2d 743, 745-746 (9th Cir. 1989).

Until the Court of Appeals issued its 1994 decision, the PUD maintained that the Court had jurisdiction and a duty to determine whether the license authorized the

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[9] Liability provisions in a FPA license reflect obligations to protect property and are distinct from any eminent domain power. *See Seaboard Air Line R. Co. v. County of Crisp*, 280 F.2d 873, 876-877 (5th Cir.), *cert. denied*, 364 U.S. 942 (1960).

[10] Aside from the absence of license provisions which would be required by § 4(e), the PUD has not explained the absence of annual charges for the use of Kalispel lands. Whether those lands were tribal or allotted, annual charges would have been required since the United States held an ownership interest. 16 U.S.C § 803 (e). Allotted trust lands constitute a "reservation" under the FPA and also invoke the requirements of § 4(e). *Cf.* Pet. p. 24. *See* 16 U.S.C. § 796(2) ["and other lands and interests in lands owned by the United States"]; *Escondido*, 466 U.S. at 781. The Commission statement (Pet. pp. 16, 22) that "allotted lands" were affected did not constitute a finding that all the Indian lands "affected" were allotted, however. As discussed in the Statement of the Case, some of the lands were in tribal trust status at all relevant times.

occupancy of Indian trust lands. In its opening brief on appeal, it said:

> . . . All that remained to be done, and which the District Court failed to do, is to complete the litigation by determining that the PUD had a legal right under its license to occupy such lands and the method to be used for the determination of compensation for future damages. Indeed, as previously shown, it would have been a simple matter for the District Court to issue a Declaratory Judgment concerning the PUD's legal rights under its license and to establish the method to be used for future compensation. The record is clear and complete and fully supports the remedy requested by the PUD. This Court can grant such remedy based upon the record before the District Court and that is now before this Court. The refusal of the District Court to provide such a remedy was an abusive [sic] discretion because it did not provide full and complete adjudication of the issues and will lead to continuous litigation in the future.

Corrected Brief of PUD, Appellee and Appellant, Phase III, Ninth Cir. Nos. 88-3617, Etc. (November 18, 1992), p. 65 (citation omitted). On October 5, 1987, following the district court's declaration of a trespass and reservation boundary determination at 2028 feet, the PUD had filed a motion for an order

> declaring that under the license and amendment issued by the Federal Power Commission for Project No. 2042, the PUD is entitled to operate the Box Canyon project so long as the backwater does not exceed elevation 2041 at the U.S.G.S. Cusick Gage and two (2.0) feet of backwater on

> the tail race of Albeni Falls Dam as long as the PUD pays damages for the use of Indian Land on the Kalispel Indian Reservation based upon loss of grazing.

PUD's Motion For Declaratory Judgment Re: Operation Of The Box Canyon Project And Future Damages Based On Grazing Values, filed October 5, 1987. *See also* PUD's Motion to Amend to Conform to the Evidence, filed October 5, 1987. The United States opposed the PUD's motion on behalf of the Kalispels because the PUD sought to end-run the Federal Power Act licensing process and have the Court set future payments for the continuing occupancy of Indian trust lands. *See* United States' Memorandum in Opposition, (November 23, 1987), p. 11. Future annual charges for the occupancy of Indian trust lands, as opposed to damages for a trespass, is a matter properly left to the Commission, when and if occupancy of the Indian trust lands is permitted in accordance with the FPA.

In Barring Inverse Condemnation, *United States v. Clarke* Followed The Well-Settled Principle That The Use And Ownership Of Indian Trust Lands May Only Be Acquired In The Manner And To The Extent Congress Has Authorized

United States v. Clarke did not change the law. By the 1950's, when the PUD first flooded the Kalispel trust lands, it was well-established that conveyances of interests in Indian trust land require Congressional authorization; neither tribal nor allotted trust lands could be subject to a condemnation under state law that Congress had not "specifically" authorized. *See Felix S. Cohen's*

Handbook of Federal Indian Law, (U. New Mex. 1942 ed.), pp. 310, 381; *Minnesota v. United States*, 305 U.S. 382, 389 (1939). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. at 233-234; *F. Cohen, Handbook of Federal Indian Law* (1982 ed.) at 510-528.

The decision in *United States v. Clarke* is sound. In *Clarke*, the Court concluded that Congress has not provided the specific authorization required for an inverse condemnation of Indian trust lands. The Court found no such authorization in 25 U.S.C. § 357, 31 Stat. 1084, which permits judicial condemnation of allotted trust lands. It rejected the contention the PUD wants to litigate here: that an eminent domain action need not precede a taking. 445 U.S. at 255, 259. The Court ruled that allotted Indian trust lands may only be condemned through a formal judicial proceeding in accordance with *Minnesota v. United States*. 445 U.S. at 254.

Rather than invoke the procedures and standards of the FPA governing the occupation of Indian trust lands for power purposes, the PUD seeks to establish a right to flood the Reservation by an inverse condemnation for which there is no Congressional authorization. Other than expressing concern for its own circumstances, the PUD offers no justification for overruling *Clarke*. Moreover, overruling *Clarke*, which construes 25 U.S.C. § 357, would not legitimize the PUD's actions. That statute only applies to allotted trust lands. It is inapplicable to tribal trust lands, which cannot be condemned by inverse condemnation or formal, judicial condemnation. *See Nebraska Public Power District v. 100.95 Acres of Land*, 719 F.2d 956,

961-962 (8th Cir. 1983); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005-1006 (8th Cir. 1976). Any rise in the water level along the reservation would necessarily flood tribal trust lands. Thus, whatever authority there is to condemn the allotted lands would be insufficient to accomplish a lawful occupancy of this Reservation area. 28 F.3d at 1553 n.18, App. 24a.

The PUD's argument that § 21 of the FPA authorizes the condemnation of these Indian trust lands is also foreclosed by Supreme Court precedent. Whether the Kalispel land is tribal or allotted, the FPA does not permit eminent domain powers to be exercised over Indian trust lands. As explained in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 113-114 (1960):

> . . . By § 21, 16 U.S.C § 814, licensees are authorized to *acquire* "the lands of property of others necessary to the "licensed project" by the exercise of the right of eminent domain" in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all-inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States, because § 10(e) of the Act, 16 U.S.C 803(e), expressly provides that the license shall pay the United States reasonable annual charges . . . for recompensating *it* for the *use, occupancy, and enjoyment* of *its* lands or other property (emphasis added) devoted to the licensed project.

See Court of Appeals, (Phase 3), 28 F.3d at 1549 n.5; App. 11a-12a n.5.

The District Court had refused to issue an injunction, relying on state law and the incorrect premise that inverse condemnation of the Indian trust lands was permissible. *See* Conclusion of Law (August 10, 1987) # 1, App. 42a (" . . . where a municipality has damaged land for public purposes, such as in this case, the only remedy authorized under state law is just compensation for such taking."). The Court of Appeals reversed. 28 F.3d at 1551. It did not rule that an injunction must issue but remanded the injunction request for reconsideration in light of the proper legal standard.

The Court of Appeals Did Not Reverse Any Findings Of Fact And Its Rulings Were Adequately Supported By The Record

The Court of Appeals' statement that the PUD flooded the Indian trust lands, knowing it had no right to do so, is well-supported in the record. *See* Findings of Fact (August 10, 1987), # 9, 10, App. 37a, 39a-40a. The PUD does not point to any statute, regulation, or legal principle which would have authorized it to occupy Indian trust lands simply because it felt "frustrated" by the BIA review process, a reluctance of the Indians to grant the PUD the desired easements, or some other factor posing a delay or obstacle. *See* Pet. p. 22. Moreover, even if easements to flood all the Kalispel lands throughout the year had been granted, those easements would not be sufficient. Unless the PUD had a permit or valid existing right-of-way granted prior to June 10, 1920, which it did not, an FPA license was required to occupy reservation trust lands. *See* FPA § 23(b), 49 Stat. 839, 846, 16 U.S.C. § 817. *See also Lac Courte Oreilles Band, Etc. v.*

Federal Power Com'n, 510 F.2d 198, 209 n.40 (D.C.Cir. 1975).

While contending, on the one hand, that it believed no Indian trust lands would be flooded, the PUD also claims it fully advised the FPC that Indian trust lands would be occupied and the Commission made the necessary findings under § 4(e) of the FPA, 41 Stat. 1066, as amended, 16 U.S.C. § 797(e). The PUD's contentions are unsupported by the record. The District Court's finding regarding a lack of bad faith cannot be equated with a finding that the PUD had made a good faith effort to comply with the special federal law provisions governing occupation of Indian trust lands. To the contrary, the Court explained its rationale this way:

> . . . But it seems to me that under all the circumstances that there is no bad faith because you have tried to treat them [referring to the Indians] as you would other people, even though they get treated differently.

Trial Tr., June 4, 1987, PUD's and State's Supplemental Ex. R., Phase III, Ninth Cir. Nos. 88-3617, etc., Vol. V, p. 932.

The Court of Appeals had adequate support in the record for the observation that the absence in the license of provisions required by the FPA for such occupancy "apparently resulted from the failure of the Utility to disclose that Reservation land would be flooded by the project." 28 F.3d at 1548, App. 10a. According to the PUD's license application, the project boundaries were to be six miles downstream from the Kalispel Reservation. *See* License Application Exhibit K, Sheet 9, Pl. Ex. 1016, Appellants' Joint Excerpt of Record, Phase III, Ninth Cir.

Nos. 88-3617, etc., p. 75. *See also* Affidavit of August Mueller, August 24, 1987, Joint Excerpt, p. 76 (confirming this reading of Exhibit K). The license incorporated the Exhibit K map to describe the project. App. 54a.[11] The license states that the project would raise water levels in normal flows "for possibly 24 miles upstream" for flows up to about 90,000 cubic feet per second, and that for flows above that, "the operation of the project will have little if any effect on water levels." App. 58a-59a. The Reservation is located 30 miles upstream. *See* Letter from Acting Secretary of the Interior, Searles, to Buchanan, Jan. 18, 1952, App. 72a. This limited, geographic scope of the licensed boundaries is not a matter of potential technical dispute with Commission staff. The Director of Hydropower Licensing has the same interpretation. *See* Letter from Director, Office of Hydropower Licensing to Weis,

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[11] A revision of Exhibit K was contemplated. 11 FPC at 787-788; License Art. 38, App. 65a. In the October 3, 1956 Order Approving Exhibit And Prescribing Annual Charges, a revised Exhibit K was approved "to establish the area of Government lands partly within the Kaniksu and Colville National Forests occupied by the project and to fix and specify the annual charges." 16 FPC 1008. The Commission revised the license to cover all lands within the license project boundary, as shown by Exhibits J and K (as revised). Again, the Kalispel Reservation was not included within these exhibits or descriptions. In regard to the increased backwater, the Commission determined that only a "minor" change was required, which was to include 0.29 acres of U.S. national forest lands, with a corresponding increase in annual charges. 29 F.P.C. 534 (1963). The PUD's Application For Amendment Of License had represented that only a "minor" change in the project boundary would be needed and that the upstream project boundary was sufficient. Application For Amendment Of License, June 5, 1961, Appellants' Joint Excerpt of Record (Phase III) at 78.

Attachment G, R. 640. This correspondence was before the Court of Appeals. *See* Brief of Kalispel Indian Tribe, Appellant, pp. 18-19, n.2. The PUD does not explain how the factual disputes it alleges, even if well-founded, would warrant a grant of certiorari. *See N.L.R.B. v. Hendricks County, Etc.*, 454 U.S. 170, 177 n.8 (1981).

No Question Has Been Presented For Review Regarding The Merits Of The Decisions On Damages And Injunctive Relief; If Considered, Those Decisions Do Not Warrant Grant Of The Writ

The PUD did not present any question for review as to the propriety of the measure of damages adopted by the Court of Appeals or the appropriateness of injunctive relief. The Tribe assumes that the Court therefore will not consider the arguments on those matters, as provided in Rule 14(a).

In the event the Court does consider those matters, the measure of damages adopted, which accounts for the value of the Indian trust land as a part of the Box Canyon project, is consistent with the common law on trespass damages. The remand to the District Court of the request for injunctive relief corrects the lower court's erroneous assumption that the PUD could obtain lawful authority to occupy the Kalispels' trust land by inverse condemnation.

On appeal, the Tribe argued that trespass damages should not have been limited to grazing value but should have accounted for the lands' value for power generation. The Tribe argued that trespass damages, also referred to as "mesne profits", customarily account for the value of

the land during the trespass, rather than prior, actual use. *See* Dobbs, *Remedies* (West Pub. Co. 1973), § 5.8, p. 365. It is within the authority of the federal courts to award Indians the "rents, issues, and profits" from the illegal occupation of their lands. *See U.S. v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 344, 359 (1941); *Oneida*, 470 U.S. at 235-236. *See also* 28 F.3d at 1548 n.8, App. 13a-14a.[12]

Adopting a measure of damages based on power value did not require finding that the PUD acted in bad faith. The Court of Appeals' measure of damages is supported by the concern that excluding the lands' value as part of the power project "would encourage others to use Indian reservation lands for power production without complying with the Power Act." 28 F.3d at 1551, App. 17a-18a. It is proper to consider whether the measure of damages would reward the trespasser for failing to obtain lawful authority to occupy the land. *See Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957) (what the trespasser would have been required to pay absent

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[12] Both state and federal common law support the measure. *See, e.g., Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198, 207-209, 78 P. 904 (1904) (jury instruction proper which included the businesses or uses for which the lands were suitable during the trespass period); *Columbia and C., R.R. Co. v. Histogenetic, & C. Co.*, 14 Wash. 475, 480-481, 4 P. 29 (1896) (landowner entitled to enhanced rental value due to trespasser's improvements). The fact that the PUD knowingly violated its limited easements on Kalispel lands and sought easements from the BIA when it failed to advise the Commission that Kalispel lands were to be inundated, provides an additional reason for rejecting the District Court's measure of damages. *See Andersen v. Bureau of Indian Affairs*, 764 F.2d 1344, 1348 (9th Cir. 1985) (knowingly planting crops when lease terminated entitles Indian owner to profits).

the trespass is the appropriate measure of damages); *United States v. 5,677.94 Acres of Land*, 162 F.Supp. 108, 117-118 (D. Mont. 1958) (policy of FPA to ensure tribes are fairly compensated for use of reservation power sites may not be circumvented).

The Kalispels should not be foreclosed from establishing their damages using an acceptable method of setting annual charges under the FPA. Otherwise, they are being penalized for the unlawful occupancy of their lands. *See Confederated Salish and Kootenai Tribes v. United States*, 417 F.2d 1340, 189 Ct. Cl. 319 (1969) (tribe entitled to power value of its lands and should have the opportunity to show a denial of the full power value). As held by the Court of Appeals, use of the power site formula "will also assure that the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance." 28 F.3d at 1551, App. 17a.[13]

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[13] Confining its damage calculations to past grazing uses, the district court ignored what the PUD acknowledged was the highest and best use of the land for the prior 30 years, i.e., the land's power value. *See* Partial Transcript of Proceedings for June 2, 1987 at 153, R 614; *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 370-372 (1948) (present development of power site is convincing proof of the land's value and availability for that purpose). Power value was the major component of the land's market value during the period of trespass. In the context of a voluntary acquisition of the right to use the Kalispel lands, their power site value could be expected to enter into a compensation agreement. *Cf. Grand River Dam Authority v. Grand-Hydro*, 335 U.S. at 372-373. *See Confederated Salish and Kootenai Tribes v. United States, supra. See also Andersen v. Bureau of Indian Affairs*, 764 F.2d at 1348 (it is neither fair nor reasonable to limit tribal recovery to rent due, since tribe could have chosen to use land so as to obtain the profits itself).

Although there may be no fixed formula for the setting of annual charges required by the FPA, when Indian trust lands are made part of a power project, it is clear such annual charges have not been limited to the lands' value absent the project. Valuing the land in proportion to the power benefit it confers is certainly an accepted measure. *See City of Vanceburg, Ky. v. FERC*, 571 F.2d 630, 646 (D.C. Cir.), *cert. denied*, 439 U.S. 818 (1977); *Montana Power Company v. Federal Power Commission*, 459 F.2d 863, 869 (D.C. Cir. 1972). *See also* FERC Opinion No. 36, 6 FERC ¶ 61,189 at 61,432-61,433 (while annual charges in that case would not be based on most profitable use, net benefits method would be used).[14]

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[14] Contrary to the assertion of the PUD, Pet. 27, the damages determined by the district court were not consistent with compensation awardable when a right of eminent domain exists. Under federal condemnation, the value of the land for power generation is an appropriate measure of damages whether or not the lands are in Indian trust status. *See Public Utility No. 1 of Pend Oreille County v. Seattle*, 382 F.2d 666 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 802 (1969). Current use of property is proof of its value and suitability for such purpose. *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 372 (1948).

The PUD Has Had Ample Opportunity To Apply For A License Amendment Authorizing Occupancy Of The Kalispel Lands In Accordance With The Federal Power Act But Has Failed To Do So

Following the federal court adjudication of land ownership, FERC staff advised the PUD several times that it was exceeding its licensed project boundary, and suggested it apply for a license amendment. *See* Letter, Director, Office of Hydropower Licensing to Weis, Attachment G, R. 640. Rather than doing so, the PUD has pursued meritless contentions and now wants *Clarke* overruled so that it does not need to satisfy the Congressionally mandated prerequisites for occupying Indian trust lands for power purposes.

CONCLUSION

No adequate justification has been shown for certiorari and the writ should be denied.

Dated this 16th day of February, 1995.

Respectfully submitted,

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